

**LEGAL, POLITICAL AND PRACTICAL OBSTACLES TO THE
ENFORCEMENT OF LABOR LAWS IN EL SALVADOR**

by

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Introduction: Employment

The following is a report on labor rights compliance in El Salvador. The report was authored by FESPAD and the International Labor Rights Fund, and is based on primary and secondary research by those organizations.

El Salvador is one of five Central American countries currently engaging in negotiations with the United States of America over a Central America Free Trade Agreement. This agreement would provide for quota and duty free treatment for goods traded between the U.S. and Central America.

A country of 6.3 million people, El Salvador is roughly the size of Massachusetts with a Gross Domestic Product of roughly \$14.3 billion. The recent political and economic history of El Salvador has been turbulent. The civil war that took place between 1980-1992 ravaged the country, taking the lives of more than 75,000 people and throwing the economy into freefall. In 1992 the opposing sides signed peace accords, ending the war and instituting democratic institutions and governance. The civil war profoundly impacted the economy, and estimates of losses to infrastructure and damage to production are about \$2.2 billion.¹

El Salvador's export economy has made strides in diversifying its economy from coffee exports. Now, the Maquila sector makes up a substantial sector of the economy and provides 90,000 jobs.² More than 95 percent of El Salvador's worldwide apparel exports are destined for the U.S., and El Salvador is the sixth largest exporter of apparel to the United States, shipping clothing valued at nearly \$1.7 billion to the U.S. in 2002.³ El Salvador also is developing other export industries in other manufacturing and agricultural products in addition to coffee such as sugar and shrimp.

The full unemployment rate, according to the Ministry of Labor and Social Security, is 7.7%, although open unemployment (including the informal sector) stands at 67 %. According to the UNDP data from 2003, 6% of employed women work in agriculture, 25% in industry, and 69% in services. Of working men, 37% are in agriculture, 24% in industry and 38% in services.

Unemployment has reached alarming levels due to the economic crisis. Every year, 50,000 new people are incorporated into the labor market, but most are underemployed and work in the informal sector. 50.2% of underemployed informal sector workers receive minimum wage (\$150/month). In 2001, 25,000 people lost their direct jobs and 100,000 lost their indirect jobs in the construction industry and in 2001 and 2002, the President, Francisco Flores Pérez, fired about 18,000 public employees as part of the country's modernization program.

¹ See United States Department of State, Background Note: El Salvador (2003).

² See Ibid.

³ See National Labor Committee, <http://www.nlcnet.org/campaigns/fla/> (accessed Jan 22, 2004).

Half of the population receives income lower than the cost of the basic basket of goods (UNDP). The wealthiest 20% of the population receives 18 times more than the poorest 20% (in other, more developed countries, the difference is 5 times larger). According to conservative estimates by the Foundation for Economic and Social Development (Fundación para el Desarrollo Económico y Social (FUSADES)) and the UN Development Program⁴, in 2001, 1.3 million Salvadorans (21.4% of the population) survived on less than \$1 a day, which the World Bank considers to be extreme poverty. 45% survived on \$2 a day.

The truth is that, for workers, the current times are defined by precarious employment, labor flexibility, the influence of transnational companies, the significant presence of textile maquilas (as a proposed path to employment and development)-⁵, the privatization of public services, the weakening of the institution of the Ministry of Labor and Social Security, the disappearance of collective contracts, and the death of the union movement.

This document will hopefully offer food for the national and regional debates on these and other questions, and inspire new ideas for the survival and development of labor law, addressing such themes as freedom of association, right to collective bargaining, the elimination of forced labor and obligatory overtime, the elimination of child labor, the elimination of discrimination in access to employment, and the defense of dignified working conditions.

This document studies the evolution, content, and implications of Salvadoran labor law, and examines with precision details that reflect the crisis confronting the enforcement and application of labor law.

I. FREEDOM OF ASSOCIATION AND THE EFFECTIVE RECOGNITION OF THE RIGHT TO COLLECTIVE BARGAINING

a) Summary

The government of El Salvador is obligated under international law to protect the right of workers to freedom of association and the right to collective bargaining. While Salvadoran labor law nominally protects basic freedoms of association and the right to bargain collectively, Salvadoran law does not conform, in certain aspects, to international law. Moreover, the Salvadoran government has demonstrated a pattern of non or under-enforcement of the law as it stands.

b) Obligations under International Law

⁴ Opus City; apartado: "*Pobreza Humana y de Ingresos*". Pág.246.

⁵ Cfr. "Dr. Armando Calderón Sol. Discurso de toma de posesión". Publicación en Revista Estudios Centroamericanos, ECA No. 547 – 548; meses de mayo – junio de 1994. UCA Editores, San Salvador, Pág. 603. Presidente Calderón Sol proposed to "make El Salvador one big zona franca" as a strategy to generate employment, investment, and development in the country.

El Salvador is a member state of the International Labor Organization. It has ratified 24 ILO conventions⁶ and six of the eight fundamental conventions⁷. Notably, it has not ratified conventions 87, on the right to freedom of association, or 98, on the right to organize and bargain collectively. El Salvador is, however, nevertheless bound, by virtue of its membership in the ILO, to these conventions as stipulated in the ILO Declaration on Fundamental Principles and Rights at Work.⁸ El Salvador is also bound to principles of Freedom of Association as a signatory to the International Covenant on Civil and Political Rights (ICCPR)⁹, the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰, the American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the "Protocol of San Salvador"¹¹.

c) Compliance of National Legislation with International Law

The Right to Freedom of Association is guaranteed to private sector workers both constitutionally and in national legislation. The constitution, Article 47, and the Labor Code, Art. 204, recognize the right of private employers and workers "to associate freely for the defense of their respective interests by establishing associations and trade unions. The same rights shall be enjoyed by workers employed in autonomous official institutions."¹² While public employees are denied the right to form unions, they can form professional associations. The Labor Code also generally prohibits discrimination against workers for exercising their rights to freedom of association.¹³ Private workers are constitutionally guaranteed the right to strike¹⁴, but this right is denied to public or municipal workers¹⁵ who are subject to dismissal if they engage in strike actions¹⁶. For a strike to be legal, it must have at least 30% support of the affected workers.¹⁷

Comment [KK1]: CHECK THIS

The right to bargain collectively is guaranteed constitutionally¹⁸ and legislatively¹⁹, and employers are obligated to negotiate with a union provided it has at least 51% of the

⁶ See, ILO, ILOLEX, <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> (accessed Jan 22, 2004).

⁷ See Ibid., <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-ratif8conv.cfm?Lang=EN> (accessed Jan 22, 2004).

⁸ See ILO Declaration on Fundamental Principles and Rights at Work, International Labor Conference, 86th Session, Geneva (June 1998).

⁹ See International Covenant on Civil and Political Rights (ICCPR), Art. 22.

¹⁰ See International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 8(1).

¹¹ See American Convention on Human Rights, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador", Art. 16.

¹² Constitution of El Salvador, Art. 47; Labor Code (El Salvador), Art. 204.

¹³ See Labor Code, art. (30.4, 30.5); art. 205(a). See Generally, ILO, "Fundamental Principles and Rights at Work, A Labour Law Study" <http://www.ilo.org/public/english/dialogue/download/cafta.pdf> (accessed Jan 19, 2004).

¹⁴ See Constitution, art. 48.

¹⁵ See Ibid., art. 221.

¹⁶ See Civil Service Act (El Salvador), sect. 53(i) and 54(a).

¹⁷ See Labor Code, sect. 527-529, 534 and 553.

¹⁸ See Constitution, art. 39.

¹⁹ See Labor Code, arts. 269 & 288.

workers of the enterprise as members.²⁰ Employers who discriminate against employees due to union membership, or adherence or non-adherence to a union agreement, are subject to criminal penalties.²¹

Salvadoran law and practice, however, violates international standards both in the public and private sectors both on its face and in its application in the following ways.

i) Salvadoran law violates international standards by not extending the right of freedom of association or the right to strike to public employees.

Public employees in El Salvador do not have the right to form trade unions or to strike. The ILO's Committee on Freedom of Association has noted, however, that "[a]ll public employees (with the sole possible exception of the armed forces and the police, as indicated in Article 9 of Convention No. 87), should, like workers in the private sector, be able to establish organizations of their own choosing to further and defend the interests of their members."²² Similarly, the ILO's Committee of Experts held in its General Survey (1994) that the right of public sector workers employed in the public administration of the state to join and form trade unions may only be restricted if the legislation restricting public sector workers from organizing is limited to senior employees. And even then, those workers, according to the Committee, ought to have the right to form their own unions.²³ El Salvador's Labor Code is in violation of these standards.

Further, the labor code bans all public workers from striking²⁴, without differentiation between different kinds of public work – a clear violation of international law. The ILO has held that:

The right to strike may be restricted or prohibited only for public servants exercising authority in the name of the State²⁵. Too broad a definition of the concept of public servant is likely to result in a very wide restriction or even a prohibition of the right to strike for these workers. The prohibition of the right to strike in the public service should be limited to public servants exercising authority in the name of the State.²⁶

This is not the case in El Salvador. As the following examples illustrate, the rights to freedom of association and to bargain collectively are not extended to public employees, either in law or in practice.

²⁰ See *Ibid.*, art. 271.

²¹ See Penal Code (El Salvador), sect. 246.

²² ILO, Committee on Freedom of Association (CFA), Digest of Decisions, 1996, para. 206.

²³ See ILO, Committee of Experts, General Survey, 1994, Freedom of Association and Collective Bargaining: Right of workers and employers to establish and join organizations, paras. 48-54.

²⁴ See *Ibid.*, Art. 221

²⁵ ILO, CFA, Digest of Decisions, 1996, para. 534.

²⁶ *Ibid.*, para. 535.

(1) The Department of Education Workers' Union

On March 24th, 2000, a group of workers from the Department of Education formed the Department of Education Worker's Union (ATRAMEC). On April 5th 2000 the newly formed union presented the required documentation to the Ministry of Labor (MOL) in order to register the union and acquire legal personality.

The MOL issued a resolution, however, on May 4th, 2000 in which it refused to recognize the union. The resolution reads:

In conformity with article forty seven of the Constitution, the right to form unions belongs to workers, employers and Official Autonomous Institutions, as it is set forth in article 204 of the Labor Code, the following people are allowed to freely form labor unions to defend their common economic and social interests, without discriminating against nationality, gender, race, credo, or political ideologies: a) private employers and workers; b) workers of autonomous institutions."

While analyzing the article above, it must be concluded that workers of the Department of Education are not allowed to form this labor union, as they are public sector workers and therefore their petition to form a labor union is illegal, as stated in article 219 of the Labor Code, and as specified in article 2 of said code, which explains that the rights afforded to labor unions do not apply to public sector workers.

Therefore, based on the above-mentioned reasons, this resolution DECIDES: The approval of the Union clauses and the recognition of the union as a legal entity is WITHOUT MERIT because it contradicts the constitution and the current Labor Code.

ATRAMEC immediately appealed this decision to the Labor Department. The Labor Department initially ignored the appeal request, and then on August 9th it officially denied the appeal, giving no reason for its decision. Salvadoran law provides that when an appeal is filed, the government has five days to acknowledge the request. Although the Department of Labor did not respond until a full 96 days later, it falsely indicated that the date of its decision on the official records was actually May 8th, 2000; thus purportedly complying with the law.

Comment [KK2]: Footnote?

On June 5th 2000, ATRAMEC filed a complaint with the ILO's Committee on Freedom of Association (CFA). In June of 2001, the CFA issued a decision in which it held in part:

The Committee is bound to emphasize that the denial of the right of association of public service employees to establish unions is an extremely serious violation of the most elementary principles of freedom of association. Consequently, the Committee urges the Government as a matter of urgency to ensure that the national legislation of El Salvador is amended in such a way that it recognizes the

right of association of public service employees, with the sole possible exception of the armed forces and the police.²⁷

On October 10th 2001, the Secretary General of ATRAMEC sent a letter to the Minister of Labor and Social Protection, Minister Nieto Menendez, asking the MOL to adhere to the ILO finding. Once again, Minister Nieto Menendez ignored the letter, and to date has not acknowledged the ILO's recommendations.

This led ATRAMEC to inform the ILO that the Salvadoran government had yet to implement the ILO's recommendations. On April 2nd 2002, the chief of the ILO's Committee on Freedom of Association, Bernard Gernignon, sent a letter to ATRAMEC in which he notified the union that he was aware of the situation and that the CFA would revisit the case. The CFA, in Case 2190, did so; reiterating its finding in Case 2085, and again called upon the government of El Salvador to amend its labor code and recognize ATRAMEC as a registered union with legal personality. The government has yet to do so.

Concurrently with its actions before the ILO, ATRAMEC filed an injunction (*demanda de amparo*) with the Supreme Court on July 25th, 2000 against the Minister of Labor and Social Protection. [This case, No. 434-2000, is still pending. ATRAMEC is also preparing to bring its before the Inter-American Commission on Human Rights.

Comment [KK3]: This was a long time ago. Is it indeed still pending?

(2) *The Union of Workers of the Ministry of Finance*

The ATRAMEC case, unfortunately, is not an isolated incident.

In May 2001, workers in the Department of Treasury united to form SITRAMH (Sindicato de Trabajadores de Ministerio de Hacienda). On May 15th, 2001, the union filed the necessary legal documentation with the MOL to obtain legal recognition as a union. Article 219 of the Labor Code provides that a labor union can be officially recognized by the MOL in two ways: first, by issuing an administrative act in which it recognizes the requesting party as a legal entity; second, through administrative silence, by which the MOL makes no decision for 30 business days after the date of application by the requesting party.

On June 26th, 2001, the MOL notified SITRAMH of its decision to deny SITRAMH recognition as a legal entity, arguing that the Labor Code did not apply to employees of the Finance Ministry, and that the Constitution prohibits the formation of unions by public sector workers.²⁸ SITRAMH filed an appeal on June 27th, 2001, arguing that the MOL's response did not conform to the requirements of law.

²⁷ ILO, Committee on Freedom of Association, Complaint against the Government of El Salvador presented by the Trade Union Federation of Food Sector and Allied Workers (FESTSA), the Company Union of Workers of Do all Enterprises S.A. (SETDESA) and the Ministry of Education Workers' Union (ATRAMEC) Report No. 323, Case(s) No(s). 2085, para. 173.

²⁸ Notably, the Labor Department's decision contained several errors, including: incorrectly indicating the date of SITRAMH's original petition (May 21st of 2000, a whole year before it was actually filed),

The denial by the Department of Labor to SITRAMH's request came on June 27th, 2001 - 31 business days after the request was filed. Because of this, SITRAMH asked the Minister of Labor to recognize an order of administrative silence in order to recognize SITRAMH's legal status.

Minister Menendez rejected the petition on July 9th, 2001. SITRAMH filed a suit on October 4th, 2001 with the Supreme Court's Administrative Conflicts section.²⁹

Comment [KK4]: What result?

In addition to the obstacles to union formation, workers at the Finance Ministry then experienced anti-union discrimination in the form of firings. Beginning in December 2001, a large number of firings took place at the Finance Ministry, where some 217 positions were eliminated. Among those fired were 14 members of SITRAMH and 14 members of the existing Association of Finance Ministry Employees (AGEMHA). The job classifications of other AGEMHA executive members were reportedly changed from permanent to contract status.³⁰

ii) El Salvador's Labor Code and Ministry of Labor inadequately protects against dismissals and suspensions motivated by anti-union animus.

Although the right to freedom of association is guaranteed to private sector workers and workers in autonomous public institutions, El Salvador's labor code provides inadequate penalties and remedies when employers are found to engage in anti-union motivated actions. Although firing workers because they are union members is prohibited in El Salvador's labor code, Human Rights Watch notes in its recent report on freedom of association in El Salvador, "Deliberate Indifference: El Salvador's Failure to Protect Workers' Rights", that the penalties for doing so are so low that there is little incentive for employers not to. Employers are not required to reinstate workers fired due to union membership, but are rather required to pay 30 days salary for every year worked³¹ - a very small price to pay for breaking a union or getting rid of union activists. The Labor Department also systematically under-enforces Salvadoran labor law and does not adequately exercise its authority.

These issues are particularly salient in the Free Trade Zones (FTZs) of El Salvador. The U.S. Department of State has noted that "there were credible reports that some factories dismissed union organizers, and there are no collective agreements with the 18 unions active in the maquila sector".³² In addition, blacklisting of union organizers has been

incorrectly identifying the notary public, and making several irrelevant statements that were apparently copied from an entirely different case.

²⁹ See Division of Disputed Administrative Matters of the Supreme Court (El Salvador), Case No. 132-S-2001.

³⁰ See American Center for International Labor Solidarity (ACILS), Central America: Labor Rights Reports and Child Labor Reports Pursuant to the Trade Act of 2002, sect 2102 (8-9), 2003, p.45.

³¹ See Human Rights Watch, "Deliberate Indifference: EL Salvador's Failure to Protect Workers' Rights", p.11.

³² United States Department of State, Human Rights Report 2002. Since the writing of that report, at least one collective agreement was signed in the Tainan factory. See ACILS, pp.37-38.

noted to frequently occur in El Salvador's FTZs.³³ The following cases illustrate the difficulties faced by workers who have been fired due to union activities to obtain redress and justice.

(1) Lido, S.A.

Lido, S.A. de C.V. is a bread and dessert manufacturer that operates under the name of Lido. According to GMIES and Human Rights Watch, Lido reportedly fired 11 union leaders and 52 union members between May 2002 and November 4, 2002 when the workers went on a one day strike in response to Lido's unwillingness to negotiate salary reviews.³⁴ According to HRW, the company targeted union members and forced them to sign resignation papers with the collaboration of the Ministry of Labor.³⁵ In response to a complaint filed by SELSA, the union representing Lido's workers, the ILO's CFA found that "the Committee cannot rule out the possibility that the dismissals were carried out in reprisal for the protest measures undertaken by the workers, which would be a serious violation of freedom of association."³⁶ Workers raised the matter with the Department of Labor in May 2002, but it has yet to take any action.

(2) Hanchang Textiles/Oriental Tex

According to a report by the National Labor Committee (NLC), Hangchang Textiles, an apparel producer, has engaged in anti-union motivated dismissals and discriminatory conduct.³⁷ Hanchang had a long history of engaging in conduct that violated international standards forbidding anti-union motivated discrimination against its employees. Hanchang, which had produced for Western buyers such as Philips Van Heusen (PVH), had reportedly fired a number of union activists and leaders when they organized to form a union, SITEHSA, in the factory.³⁸ Due to the eventual intervention of PVH and the National Labor Committee, these workers were eventually rehired. However, in order to take advantage of tax breaks extended to companies operating in the Free Trade Zones, Hanchang then began to officially reorganize itself into a new corporate entity known as Oriental Tex. For all intents and purposes, this was one in the same company: it had the same owner, was housed in the same factory, and supplied the same buyers. Yet it sought to be recognized as a completely new company for the purposes of law.

³³ See ACILS, p.38; Workers Rights Consortium, Assessment re Primo S.A. de C.V. (El Salvador): Preliminary Findings and Recommendations (March 19, 2003), <http://www.workersrights.org/Primo%20SA%20de%20CV%20El%20Salvador%203-19-03%20Espanol.pdf> (accessed Jan 19, 2004).

³⁴ See Ibid. pp.32-33.

³⁵ See Ibid. p.36.

³⁶ See Ibid. p.33, citing ILO, Complaint against the Government of El Salvador presented by SELSA, supported by the International Confederation of Free Trade Unions (ICFTU), Report No. 330, Case No. 2208, Vol. LXXXVI, 2003, Series B, No. 1. para. 600.

³⁷ See generally National Labor Committee, "Hanchang Textiles/Oriental Tex", Dec 17, 2003.

³⁸ See Ibid., pp. 9-10.

The NLC found that that Hanchang/Oriental Tex, in the process of its reorganization, engaged in systematic and deliberate firing of union members.³⁹ Oriental Tex it did not rehire union members into its new emanation, Oriental Tex; nor did it recognize SITEHSA as the legitimate union. The Ministry of Labor, however, refused to “pierce the corporate veil”, and found that the workers had no right of reinstatement and that their union had no right of recognition at Oriental Tex.⁴⁰

(3) Union of Workers of Doall Enterprises

On November 22nd 1999, a group of workers from the textile maquila “Doall Enterprises” in the San Marcos Export Processing Zone, 5km south of San Salvador, formed the Union of Workers of Doall Enterprises (SETDESA)

In response, on 23 and 24 November, “the company began selective dismissals of SETDESA members, members of their families, their associates and sympathizers. In order to obtain their salaries and redundancy payments, they were required to sign blank sheets (which were subsequently used as resignation letters).”⁴¹ GMIES, an author of this report, found that 38 of the fired workers were founders and officials of SETDESA. GMIES also concluded that the company had coerced the workers into signing blank sheets. These sheets subsequently were turned into letters of resignation without the consent of the signers.

The fired union members notified the Ministry of Labor of the company’s actions, claiming it was a violation of article 205 of the Labor Code, which states:

It is forbidden for any person to: a) coerce another person into joining or leaving a labor union, except for cases of expulsion; b) stop another person from forming a union; c) discriminate against workers because of their union affiliations; d) commit acts aiming to stop a union from being formed or acts aiming disband a union or to submit it to employer’s control; e) engage in any form of action against the legitimate exercise of the right to belong to a professional organization.

The MOL claimed that since the workers resigned from Doall Enterprise they could not take action in favor of the union because the workers voluntarily resigned from the company.

SETDESA responded by presenting its case to the General Labor Inspectorate and Direccion General de Trabajo, both sections of the MOL. They also took their case to the

Comment [KK5]: Can you translate this?

³⁹ Ibid., p. 17.

⁴⁰ Ibid., p. 20.

⁴¹ See ILO, Committee on Freedom of Association Complaint against the Government of El Salvador presented by the Trade Union Federation of Food Sector and Allied Workers (FESTSA), the Company Union of Workers of Doall Enterprises S.A. (SETDESA) and the Ministry of Education Workers' Union (ATramec) Report No. 323, Case(s) No(s). 2085, para. 166.

Procuraduría the Defense of Human Rights; and the ILO. The Department of Labor ignored the documents presented by SETDESA.

Comment [KK6]: Please translate

Comment [KK7]: Did any others respond?

The government never responded to the allegations brought before the ILO's Committee on Freedom of Association held that:

The Committee feels it has no choice but to conclude that the company attempted to block the establishment of SETDESA. Given that the founders were able subsequently to rejoin the company and that the Government states that they can establish another union if they so wish, the Committee will confine itself to expressing its profound regret at the anti-union acts of discrimination and interference on the part of the company and to drawing the attention of the founders of SETDESA to the fact that they may, if they so wish, make further attempts to obtain legal personality for this union.

However, despite these assurances from the government, MOL has never issued a warning to Doall Enterprise, once more failing in its obligation to protect the basic rights of workers.

iii) El Salvador's Ministry of Labor creates illegal obstacles to union registration

El Salvador's Labor Code violates international standards by creating obstacles to union registration, and the government has taken extraordinary steps to prevent unions from registering.⁴² Human Rights Watch and the ILO have found that certain provisions of the Salvadoran labor code violate, on their face, principles of freedom of association. The ILO's Committee on Freedom of Association has found, for example, that:

(a) [Salvadoran] legislation imposes a series of excessive formalities for the recognition of a trade union and the acquisition of legal personality that are contrary to the principle of the free establishment of trade union organizations (the requirement that the trade unions of independent institutions should be works unions), that make it difficult to set up a trade union (minimum number of 35 workers to establish a works union) or that in any case make it temporarily impossible to establish a trade union (the requirement for six months to have passed before applying to establish another trade union even if the previous one did not obtain legal personality), the Committee... urges the Government to take measures with a view to amending the legislation so that the current excessive formalities that apply to the establishment of trade union organizations are removed and so that workers do not have to constitute enterprise-based works unions if they do not consider this to be appropriate.⁴³

⁴² Human Rights Watch, "Deliberate Indifference: EL Salvador's Failure to Protect Workers' Rights", pp. 12-13.

⁴³ See ILO, Committee on Freedom of Association, Complaint against the Government of El Salvador presented by Communications International (CI) Report No. 313, Case(s) No(s). 1987, para. 117.

The excessive formalities noted by the ILO are not only enshrined in the text of the law. As the following case illustrates, the Ministry of Labor engages in excessive formality in the registration process, putting up obstacles to union registration that violate international standards. The ILO's Committee on Freedom of Association has articulated a principle of timely registration, finding that

"The formalities prescribed by law for the establishment of a union should not be applied in such a way as to delay or prevent the setting up of occupational organizations."⁴⁴; and that "the formalities prescribed by law for the establishment of a trade union should not be applied in such a manner as to delay or prevent the establishment of trade union organizations. Any delay caused by authorities in registering a trade union constitutes an infringement of Article 2 of Convention No. 87."⁴⁵

As the following cases demonstrate, these principles are routinely violated.

(1) FESTSA Case

On March 4, 2000, several food sector unions united to form the Union Federation of Workers in the Food Sector (FESTSA). The federation presented the documents required to have their organization recognized as a legal entity to the Minister of Labor, Jorge Isidoro Nieto Menendez, on March 29th of that year.

On May 8, 2000, the Labor Minister notified FESTSA of a resolution he issued on May 2, 2000, denying FESTSA's request for recognition. The resolution justified the Labor Minister's decision by concluding that the union had not followed proper formal procedures when forming the union. FESTSA registered a complaint with the ILO's Committee on Freedom of Association, claiming the government's actions violated its obligations under Conventions 87 and 98.

In June of 2001, the CFA concluded:

The Committee deeply regrets that, given that the problem arose from procedural errors that could easily have been rectified, the authorities did not attempt to obtain the further documentation or information required by asking the founders of the Federation to rectify procedural anomalies found in the constituent document within a reasonable period. The Committee recalls that, although the founders of a trade union should comply with the formalities prescribed by legislation, those formalities should not be of such a nature as to impair the free establishment of organizations (see Digest of decisions and principles of the Freedom of Association Committee, 4th edition, 1996, para. 248), and requests

⁴⁴ Ibid., para. 249.

⁴⁵ Ibid., para. 251.

the Government to keep it informed of any follow-up to a renewed application by FESTSA for legal personality.

After filing the complaint with the ILO's, FESTSA also filed a suit with the Supreme Court's Administrative Contentions section against the Minister of Labor, Jorge Isodoro Nieto Menendez.⁴⁶

(2) STITHS Case

On March 24, 1998, workers united to form the Union of Workers in the Hotel and Tourism Industry (STITHS). On May 19, 1998, the union presented the required documents to the Department of Labor and Social Security. The Ministry of Labor, however, rejected STITHS's request on July 1, 1998, justifying its decision based on a finding that STITHS was formed by workers in an autonomous public institution, and that STITHS was an industry-wide union. The MOL claimed that Salvadoran law forbid industry-wide unions in independent public institutions. The Department of Labor also claimed that tourism was not an actual industry, and as such, a union of the tourism industry could not legally be formed.

STITHS appealed this decision to the Supreme Court, filing suit in the Supreme Court's Administrative Contentions section on July 10, 1998.⁴⁷

The Supreme Court ruled on May 17, 2000 that the Labor Department's decision denying recognition to STITHS was illegal, and that the Labor Department should accordingly recognize STITHS as a legal entity.⁴⁸

Comment [KK8]: Carol has another date on the decision.

It took 26 months for the MOL issued that resolution on May 29th, 2002, 26 months after the petition was initially filed. This time span violates international standards by not recognizing STITHS' right to register its union in a timely manner.

(3) SUTTEL Case

Another example in which workers were denied their right to register their unions is the SUTTEL case. Workers formed the Union of Workers of the Telecommunications Company of El Salvador (SUTTEL) on May 24th, 1998 and immediately submitted a request for recognition to the Ministry of Labor. Upon submission of their registration documents, the Department of Labor and Social Security, without very much explanation, denied the request.

SUTTEL filed suit with the Administrative Contentions section of the Supreme Court, contending the Labor Department's decision was arbitrary and violated the law.⁴⁹

⁴⁶ See Division of Disputed Administrative Matters of the Supreme Court, Case No. 48-F-2000 (July 28th, 2000).

⁴⁷ See Division of Disputed Administrative Matters of the Supreme Court, Case No. 84-S-98 (El Salvador).

⁴⁸ See Ibid.

The Court issued its ruling on September 11, 2000 in which it declared that the MOL's refusal to recognize SUTTEL was illegal. The Court accordingly ordered the Department of Labor to recognize SUTTEL as a legal entity.

On September 18, 2000, 8 days after the Court's ruling, the union once more filed an application with the MOL to be recognized as a legal entity. The MOL did not comply with the Court's ruling, and did not recognize SUTTEL as a union.

On October 11, 2000, SUTTEL filed a complaint with the Administrative Contentions section of the Supreme Court, arguing that the MOL was not following the orders of the Court. On October 23, 2002, the Minister of Labor finally recognized the illegality of his initial resolution and granted SUTTEL's request for recognition as a legal entity.

Comment [KK9]: What's the case number?

Comment [KK10]: Are these dates correct?

SUTTEL had to wait 29 months to obtain recognition because the MOL dragged out the process and delayed recognition. The MOL's conduct here, like in other instances, demonstrated a pattern of the right to freedom of association by improperly creating administrative obstacles to registering a union.

II. The Effective Abolition of Child Labor

Child labor is pervasive in El Salvador. Although El Salvador's national legislation is generally in compliance with international standards, it has not adequately implemented its law. Moreover, a variety of work persists that might be considered worst forms of child labor for the purposes of ILO Convention 182, on the Elimination of the Worst Forms of Child Labor.

International Law

El Salvador has ratified, and is legally bound to implement, ILO fundamental Conventions, 138, on Minimum Age of Employment, and 182 on the Elimination of the Worst Forms of Child Labor. It has also ratified Convention 77, Medical Examination of Young Persons (Industry) Convention; and Convention 78 Medical Examination of Young Persons (Non-Industrial Occupations) Convention. EL Salvador is also obligated to implement the right to an education as guaranteed in the International Covenant on Economic, Social and Cultural Rights,⁴⁹ the Convention on the Rights of the Child⁵¹, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "The Protocol of San Salvador"⁵². El Salvador is party to all of these conventions. The right to an education is also guaranteed in the Universal Declaration of Human Rights.

⁴⁹ See Division of Disputed Administrative Matters of the Supreme Court, Case No. 101-R-98. (El Salvador).

⁵⁰ See ICESCR, Art. 13.

⁵¹ See Convention on the Rights of the Child, Art. 28.

⁵² See Protocol of San Salvador, Art. 13(3).

National Law

Minimum Age

Children under 14 years of age and “those who have reached that age but are still required by law to continue their education may not be employed to do work of any kind”. At the same time, “their employment may be authorized if this is deemed to be necessary for them to support themselves and their families, provided that this does not prevent them from complying with the minimum statutory schooling requirements.”⁵³

Unhealthy or Hazardous Conditions

Employment of minors is completely prohibited, however, in activities considered to be unhealthy or hazardous.⁵⁴ These activities are listed in the Labor Code.⁵⁵ Minors under 18 cannot be admitted to employment without undergoing a medical examine to confirm their fitness for the work in which they will be employed.⁵⁶

Hours of Work

Minors cannot work more than six hours a day and 34 hours per week.⁵⁷ Night work is prohibited⁵⁸, but minors may work up to two hours a day overtime provided it does not entail heavy exertion.⁵⁹

Ensuring Access to Basic Education

Employing minors of compulsory school age, for whom education is free, is prohibited.⁶⁰ The Labor Code permits employment of children from the age of 12 years old provided that it is not likely to endanger their health or development, jeopardize school attendance or participation in approved vocational training, or prevent the child from benefiting fully from the instruction received.⁶¹ There are no provisions, however, providing that minors are entitled to facilities that would allow them to attend school by adapting educational timetables and facilities to their particularly work situations.⁶²

Compliance

⁵³ See Constitution, art. 38.10; Labor Code Section 114, Family Code Art. 380.

⁵⁴ See Constitution, art. 38.10.

⁵⁵ See Labor Code, arts. 106-108.

⁵⁶ See Ibid. art. 114.

⁵⁷ See Labor Code., art. 116; Constitution, art. 38.10.

⁵⁸ See Labor Code., art. 116; Constitution, art. 38.10.

⁵⁹ See Labor Code, art. 116.

⁶⁰ See Constitution, arts. 38.10 and 56; Labor Code, art. 114; Family Code, section 376).

⁶¹ See Labor Code, art. 114.b.

⁶² See ILO, “Fundamental Principles and Rights at Work, A Labour Study”, p. 16.

Although El Salvador has ratified the core ILO conventions on child labor, and enshrined most of their requirements in national legislation, child labor in El Salvador is ubiquitous. According to the annual household census undertaken by the Directorate General of Statistics and Censuses in 2001, over 75,000 children between the ages of 5 and 13, and over 147,000 minors between the ages of 14 and 17, worked.⁶³ The report also concluded that a total of 348,300 children and young adults between the ages of ten and nineteen either had a job or were seeking work in 2001. 30% of this total was women and girls. Child labor is particularly concentrated in the informal sector, and children from poor families and orphans frequently work for their own or their families' survival as laborers in small businesses.⁶⁴ The Ministry of Labor, however, tends to concentrate its efforts in the formal sector, where child labor is relatively rare.

Worst forms of Child Labor

Perhaps most distressing is the occurrence of forms of child labor that are banned by Convention 182, concerning the Worst Forms of Child Labor. In 2001, a national committee composed of seven government agencies, representatives of labor, employers and NGOs identified several industries in which child labor constituted the worst forms. It concluded that commercial sex work, work in garbage dumps, fishing/shellfish harvesting, sugarcane farming, and fireworks constituted the worst forms of child labor in El Salvador. The ILO, in 2002, produced a series of reports that analyzed several industries in which it found child labor that is considered to be among the worst forms of child labor, and provided recommendations to the government of El Salvador to pursue their elimination. These areas were: sugar cane, domestic work, fishing, commercial sexual exploitation of children and adolescents, and the urban informal sector.⁶⁵ What follows is a brief summary of conditions in three of these areas as analyzed from the ILO reports, and a study by Human Rights Watch (HRW) on domestic work.

1) Domestic Work

Human Rights Watch, in 2004, and the ILO, as part of a series detailed 2002 studies, concluded that child domestic work is one of the worst forms of child labor.⁶⁶ The ILO estimates that approximately 21,500 children between the ages of fourteen and nineteen are employed in domestic-type work, 95% of which are women and girls.⁶⁷ Human Rights Watch accordingly estimates that "one out of every five girls between the ages of ten and nineteen who has or is seeking a job is a domestic worker".⁶⁸ HRW reports that typical work for a domestic working child includes cleaning, cooking, washing dishes

⁶³ See United States Department of State Human Rights Report, El Salvador (2002), sect. 6(d).

⁶⁴ Ibid.

⁶⁵ See ILO IPEC, <http://www.ilo.org/public/english/standards/ipec/simpoc/elsalvador/index.htm> (accessed Jan 20, 2003).

⁶⁶ See International Labor Organization, International Program on the Elimination of Child Labor (IPEC), "El Salvador Child Domestic Workers: A Rapid Assessment" (February 2002), p. vii; Human Rights Watch, "El Salvador: Abuses against Child Domestic Workers in El Salvador", Vol. 16 No.1(B) (January 2004).

⁶⁷ See ILO, IPEC, "El Salvador Child Domestic Workers: A Rapid Assessment", p.19.

⁶⁸ Human Rights Watch, "El Salvador: Abuses against Child Domestic Workers in El Salvador", p. 10.

and laundry, child care, and shopping.⁶⁹ Long hours are pervasive, with days lasting from four to sixteen hours,⁷⁰ and wages ranging from nothing to \$100/month.⁷¹ Domestic child workers often face physical and psychological abuse. This includes reports of being punched⁷² and being subject to sexual abuse⁷³. HRW has called upon El Salvador to enforce the provisions of the constitution and the Labor Code that restrict the workday to six hours and the work week to 34 hours for children in any class of work; to ensure that the right of children to a free education be respected as guaranteed in Salvadoran law; and that the government set an absolute minimum age for employment, explicitly prohibiting the employment of all children under the age of eighteen in harmful or hazardous work.⁷⁴

2) Sugarcane Industry

Another area of child labor in El Salvador in which the ILO considers that child work constitutes a worst form of child labor is in the sugarcane industry.⁷⁵ According to sugarcane producers interviewed by the ILO, and approximately 5000 children work directly in the sugarcane industry, and 25,000 indirectly, with children making up between 27 to 30 workers in every team of 100 workers.⁷⁶ Children work long hours in the sun without shade, suffer skin conditions from contact with the sugar cane leaves, and are accorded few accommodations.⁷⁷ Most children attend work with their parents and give their wages to the family. Children under 12 are generally unpaid, considered to be “helpers” instead of full-fledged workers. Most children earn wages between \$3.20 and \$3.26 per day.⁷⁸ Many of the boy workers cut cane, exposing themselves to injury from the machetes that they are required to use, while girl workers tend to work as gatherers.⁷⁹ The health of the child workers was found to be adversely affected by this work.⁸⁰

The ILO called upon El Salvador to form a multidisciplinary team to carry out initiatives aimed at eliminating child labor in the sugarcane industry; develop a plan of action specifying the necessary steps to this form of child labor; and to monitor compliance with current legislation and with instruments addressing child labor issues.⁸¹

3) Fishing Industry

⁶⁹ See *Ibid.*, p.11.

⁷⁰ See *Ibid.*, p.13.

⁷¹ See *Ibid.*, p. 14. The ILO study reported that wages ranged from 0 to \$114. See HRW, p.14 (citing ILO study, p. 33).

⁷² See *Ibid.*, p. 16.

⁷³ See *Ibid.*, p.17.

⁷⁴ See *Ibid.*, p.6.

⁷⁵ See ILO, IPEC, *El Salvador Child Labour in Sugarcane: A Rapid Assessment* (February 2002), p. iii.

⁷⁶ See *Ibid.*, p.iv.

⁷⁷ See *Ibid.*, p.v.

⁷⁸ See *Ibid.*, p.vi.

⁷⁹ See *Ibid.*

⁸⁰ See *Ibid.*, p. vii.

⁸¹ See *Ibid.*, p. viii.

According to the ILO, 2445 children, work in the fishing sector.⁸² These children are subject to a range of dangers, including: drowning, being carried out or lost at sea, sunstroke, attacks by sharks, respiratory problems, blindness, hearing problems as a result of exposure to high water pressure, addiction to stimulants, alcoholism, wounds and disfiguration of the hands and body, arthritis, physical and psychological including sexual abuse.⁸³ Children work from five to thirteen hours a day, often working at night, and often alone.⁸⁴ Children generally range from eight to sixteen years of age, and their bodies show the effects of their work: this includes wrinkled and burnt skin, and bleached hair from sun and salt exposure.⁸⁵ The ILO concluded that this work constitutes one of the worst forms of child labor, and recommended that legislation be designed and reformed in El Salvador pertaining to child labor in the fishing industry, and comprehensive assistance be provided to the children suffering in these industries.⁸⁶

c) Conclusion

We note the following obstacles:

Political Obstacles

Lack of interest in eradicating child labor

The Salvadoran government does not show a marked interest in eradicating child labor. The Ministry of Labor and IPEC have developed a program to eliminate the worst forms of child labor, and this initiative has had a few successes.

Practical Obstacles

➤Extreme poverty crisis facing Salvadoran families

El Salvador is experiencing a serious economic crisis. Open unemployment, the loss of acquisitional power, low salaries, and dollarization have contributed to conditions of extreme poverty. This has meant that not only fathers, but also mothers and children are forced to find jobs. In cases where the mother is the head of the household, child labor becomes obligatory to enable the family to survive.

➤Family perceptions of education and work

In some sectors, like the rural areas, there is a perception that "studying doesn't feed anyone, while work brings dignity." From this perspective, children should start working at a young age, because it will educate them and bring in income. When these children fail to attend school, it contributes to the continuity of the poverty cycle.

III. DISCRIMINATION IN EMPLOYMENT

⁸² See ILO, IPEC, "El Salvador Fishing Industry: A Rapid Assessment" (February 2003), p. 15.

⁸³ See Ibid., p. v.

⁸⁴ See Ibid.

⁸⁵ See Ibid., p. vi.

⁸⁶ See Ibid., p. viii.

while El Salvador has protections against discrimination based on sex, age, race, religion, etc., in its national law, discrimination is both open and persistent.⁸⁷

International Law

El Salvador has ratified ILO Convention 100, the Equal Remuneration Convention, and Convention 111, the Discrimination (Employment and Occupation) Convention. Convention 111 was ratified by El Salvador by Legislative Decree No. 78, passed on July 14th, 1994 and ratified by President Armando Calderon Sol on July 27, 1994. Additionally, the ICCPR forbids discrimination based on “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁸⁸ The ICESCR⁸⁹ and the Universal Declaration of Human Rights⁹⁰ also guarantee this right, but go further and obligate signatory states to provide “equal remuneration for work of equal value”⁹¹. The American Convention on Human Rights⁹² and the Protocol of San Salvador also obligates El Salvador to enforce principles of non-discrimination.⁹³ El Salvador is also party to the Convention on the Elimination of All Forms of Discrimination against Women, which specifically forbids discrimination against women in the workplace⁹⁴, and guarantees equal employment rights⁹⁵ and equal remuneration⁹⁶ to women.

National Law

The Salvadorian Constitution does not articulate a clear definition of discrimination, but Article 3 does provide that: *“Every person is equal before the law. In order to enjoy civil rights, there can be no discrimination based on race, nationality, sex, or religion. The state does not recognize hereditary privileges or hereditary jobs.”* The Labor Code similarly provides at Article 12, which states *“The state will ensure the respect of the principles of equal opportunity and equal treatment around the workplace, including access to professional training.”* Additionally, Article 30(12) of the Labor Code provides *“It is forbidden for employers...12th) to establish any kind of distinction, exclusion or preference based on motives such as race, color, sex, religion, political opinion, national or social origin, less the exceptions established by law with the purpose of protecting the worker.”*

With regard to discrimination based on union affiliation, Article 30(5) of the Labor Code provides that *“It is forbidden for employers.... 5) discriminate directly or indirectly their*

⁸⁷ See Constitution, Art. 3.

⁸⁸ ICCPR, Art. 26.

⁸⁹ ICESCR, Art. 2(2).

⁹⁰ Universal Declaration of Human Rights, Arts. 3 and 23.

⁹¹ See ICESCR, Art. 7(a); UDHR, Art. 23(2).

⁹² See American Convention on Human Rights, Art. 1; and Art. 23.

⁹³ See Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights “Protocol of San Salvador”, art. 3 and arts. 6-8.

⁹⁴ See Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 11.

⁹⁵ See Ibid., Art. 11(b).

⁹⁶ See Ibid., Art. 11(d).

employees because of their union ties or to retaliate against them for the same reason.” Article 205(c) of the Labor Code also states that: *“It is forbidden for any person to discriminate between workers because of their union ties or to retaliate against them for the same motive.”*

Finally, El Salvador’s Penal Code provides for criminal sanctions for employers who discriminate against a worker on grounds of sex, pregnancy, origin, civil status, race, social or physical condition, or religion or political conditions.⁹⁷ Violators who fail to make victims whole are subject to imprisonment for a period of six months to a year.⁹⁸

Compliance

In El Salvador, there is a significant discrimination in job offerings. An investigation undertaken by GMIES (Grupo de Monitoreo Independiente de El Salvador) demonstrated this clearly through researching the classified ads in two of the country’s major newspapers: La Prensa Grafica in the month of June of 2002 and El Diario de Hoy, in the month of July 2002.

The purpose of the research was to examine all of the job postings published in the span of 61 days, between June 30 and July 31, 2002. Weekend editions of the papers had the lowest number of job postings, about 134, and weekday editions, when a special Classified Ads booklet was published had the most number of postings, 325. There was a 40% variation in the job postings in the amount of jobs offered to men versus the amount of jobs offered to women. For example, often there would be job offers for security guards, and almost always they would specify that the candidate had to be male. While there were plenty of sales positions available for women, the majority of management positions within department stores were only being offered to men.

A second form of discrimination was aged-based discrimination. Eighteen percent of the job postings showed some kind of maximum age requirement to be considered for the position. The average age margin for jobs offered to women ranged from 18 years of age to 28 years. For men, it went from 18 years to 35 years. Once more, we see women being further discriminated against in the labor market.

Another form of discrimination was based on religious beliefs. Five percent of the Job postings required the candidate to have a recommendation from his evangelical pastor or the priest whose religion the candidate belonged to. Finally, three percent of the job postings discriminated against marital status. Secretaries, for example, usually had to be single women; the same applied to saleswomen, who not only had to be single women, but needed to have no family related obligations.

⁹⁷ See Penal Code (El Salvador), sect. 206.

⁹⁸ See Ibid.

The U.S State Department, in its Human Rights Report 2002, reported that some factories in the EPZs required female job applicants to present pregnancy test results and did not hire pregnant women.⁹⁹ The report is worth quoting at length:

Women suffer from cultural and societal discrimination and have significantly reduced economic opportunities. Priority generally is given to men for available jobs and promotions and... women are not accorded equal respect or stature in traditional male-dominated areas such as agriculture and business. A 2000 UN Development Program (UNDP) study reported a rural illiteracy rate of 38 percent for women and 34 percent for men. One of the factors that contributes to girls' leaving school is teenage pregnancy. In 2001, a former personnel officer of an autonomous government institution asserted that her supervisor had instructed her to give preference to men over women in hiring. The Penal Code establishes a sentence of 6 months to 2 years for employers who discriminate in labor relations. In practice it is difficult for employees to report such violations by their employers because they fear reprisals. In June 2000, the legislature ratified International Labor Organization (ILO) Convention 100, on equal remuneration; however, a UNDP study showed that men on average earned 14 percent more than women--\$250 versus \$219 (2,189 colones versus 1,913). The one sector in which there was an exception to this practice was in the EPZs and in-bond assembly plants, the largest source of new jobs, where women made up 85 to 90 percent of the work force. However, even in this sector, men held the majority of positions in management and in departments where employees receive higher wages (cutting, ironing, etc.). Training for women generally was confined to low-wage occupational areas where women already held most positions, such as teaching, nursing, home industries, and small businesses.¹⁰⁰

Conclusion

Political Obstacles

➤Lack of a policy against discrimination

The Ministry of Labor has not developed any campaigns against discrimination in employment, nor have they tried to combat this practice by calling attention to companies the condition employment on an applicant's age, gender, religious beliefs, political opinions, or union membership. Many business owners stand by the principle of "freedom in hiring" which implies the adoption of discriminatory measures.

Practical Obstacles

➤Culture of machismo and exclusion

The *machista* perspective is expressed in the workplace, as demonstrated by the fact that the hiring process tends to favor workers of a certain age or gender while ignoring the applicant's experience and skills. In other cases, workers of certain religious faiths, political parties, or unions are excluded.

⁹⁹ See United State Department of State, Human Rights Report, El Salvador (2002), sect. 5.

¹⁰⁰ Ibid.

IV. ELIMINATION OF FORCED LABOR AND OBLIGATORY OVERTIME

El Salvador's law reflects international norms and forbids forced and bonded labor. Forced and bonded labor generally does not exist in El Salvador, with the exception of instances of forced overtime in the maquila sector, where such obligatory labor is pervasive.

FORCED LABOR

International Law

El Salvador has ratified ILO Convention 29, the Forced Labor Convention, and convention 105, the Abolition of Forced Labor Convention. The ICCPR forbids forced labor¹⁰¹, as does the ICESCR¹⁰², the Universal Declaration of Human Rights¹⁰³, and American Convention on Human Rights¹⁰⁴.

National Law

El Salvador's law generally complies with international standards. Article 9 of the Constitution provides that "no person may be obliged to perform work or personal services without fair remuneration and without their full consent, except in the event of a national disaster and other cases prescribed by law." Section 153 of the Penal Code creates criminal penalties for anyone who forces another to work without his or her consent. It reads, "any person who, by means of coercion, obliges another to undertake, tolerate or fail to carry out some action shall be sentenced to one to three years imprisonment. When the coercion exercised has as its objective to prevent the exercise of a fundamental right, a sentence of two to four years' imprisonment shall be imposed." Prison labor is voluntary and is regulated by the Penitentiary Act, which provides that "work in prisons should not be of an afflictive nature. In so far as it is possible, work in prisons shall be similar to that done in freedom." Finally, section 13 of the Labor Code provides that "no one shall prevent others from working, except by a decision of the public, in such cases as are provided for by law. It is prohibited to use any form of forced or compulsory labor, that is to say, any work or service exacted under threat of any penalty and for which the workers has not volunteered."

Compliance

Forced or bonded labor, as traditionally understood, is not common in El Salvador. There are, however, reports of trafficking of girls and women for sexual work.¹⁰⁵ The U.S. Department of State reports in its 2003 Trafficking in Persons report that "El Salvador is a source, transit and destination country for trafficking for sexual exploitation.

¹⁰¹ See ICCPR, Art. 8(3).

¹⁰² See ICESCR, Art. 2.

¹⁰³ See Universal Declaration of Human Rights, Art. 3 (forbidding slavery or forced servitude).

¹⁰⁴ See American Convention on Human Rights, Art. 6.

¹⁰⁵ See United States Department of State, Human Rights Report, El Salvador (2002), sect. 6(f).

Salvadorans are trafficked to other Central American countries, Mexico, and the United States. Nicaraguans, Hondurans and South American nationals are trafficked to or through El Salvador".¹⁰⁶

FORCED OVERTIME

Over time, the forms of forced labor have been modified and even "modernized". One current manifestation of forced labor is obligatory overtime work, which is common in the textile maquila companies.

Article 161 of the Labor Code says that working hours can be during the day or night, and that the work week cannot exceed 44 day hours or 39 night hours. These are further reduced if the job is carried out under dangerous conditions.

The employer can legally set the work shift (Art 165 of the Labor Code) but only within the defined parameters, which are 8 hours for a day shift and 7 hours for a night shift.

Articles 169 and 170 of the Labor Code establish the possibility of overtime work, which also carries legal parameters:

- The overtime work is freely agreed to by the parties, it is never obligatory;
- The overtime work is not permanent or systematic. It only occurs due to unforeseen or special circumstances;
- Workers can permanently work one extra hour each day and then rest 2 days a week;
- Workers can permanently work one extra hour to complete three day shifts in companies that do uninterrupted tasks, in order to complete the full 24 hours;
- The extra hour is paid with an extra 100% of basic pay;
- If overtime work occurs because of a greater cause like a fire in the company, or an earthquake, this will only be paid with the basic salary.

In practice, however, there are 2 manifestations of forced overtime work in the maquilas. First, employers oblige all employees to work overtime, because of the amount of work that must be completed and the urgency of meeting a deadline for turning over the finished product to the purchaser. It is common to see groups of young workers working 10-12 hours daily in the maquilas in the export processing zones, in order to finish the assigned task on time. On some occasions, workers are not paid overtime, and instead are given a rest period equal to the amount of extra time worked, although this is not provided for by law. Refusing to work overtime generally leads to being fired, so workers are forced to work overtime or lose their jobs.

¹⁰⁶ United States Department of State, Trafficking in Persons Report, p. 58.

The second manifestation of forced labor is that requested by the workers themselves, because the monthly salary (\$150) does not cover their basic needs. Precarious living conditions, low salaries, and the high cost of living lead many workers, particularly single mothers, to "voluntarily" work more than 8 hours daily in order to increase their income.

In the first case, the employers impose the forced labor. In the second case, it is caused by the neoliberal model.

In the "Report on Monitoring in Maquilas and Financial Areas" done by the Monitoring and Analysis of Labor Relations Unit at the Ministry of Labor in 2000¹⁰⁷, the Ministry says, in regard to overtime, that: *"During the visits, it was clear that most maquila workers constantly use overtime work to be able to comply with production goals established by the company. While most of these overtime hours are paid according to law, it is important to note that most overtime hours are worked at night without the corresponding legal pay of 25% for each nocturnal hour."*

It is also important to note that in most companies, workers are obliged to work overtime under the threat that they will be fired or otherwise retaliated against.

This situation, besides damaging workers' health, causes family problems when they are then unable to comply with all of their obligations at home.

On some occasions, when the shift runs into night hours, workers find it necessary to spend the night at the company facilities, even though proper lodging conditions do not exist.

One particularly noteworthy situation is the fact that some workers said they favored overtime work as established by law, paid with an extra 100% over the basic salary, because this allowed them to bring in additional necessary income for their families. Nevertheless, most workers said that even with this overtime pay, their salary was still insufficient to be able to adequately provide for their families' needs. This shows the need for a revision of the minimum wage.

According to employer representatives, one of the main causes for overtime work is the fact that workers deliberately slow down production to force the company to assign overtime hours, so that the workers can receive the extra pay.

¹⁰⁷ "Informe de Monitoreo de las Maquilas y Recintos Fiscales". Unidad de Monitoreo y Análisis de las Relaciones Laborales del Ministerio de Trabajo y Previsión Social. July 2000. Pages 12 to 14. A study done with the support of USAID/SETEFE/Ministry of Labor. This study looked at working conditions in the maquilas. Its content was approved by Labor Vice Minister Lic. Fernando Avelar Bermudez, and was immediately distributed. According to testimony from members of the Monitoring Unit, when it reached the hands of the National Association of Private Companies (ANEP) and the Salvadoran Association of the Clothing Industry (ASIC), the business owners ordered the Ministry of Labor to suspend distribution and collect the copies that had already been distributed. The members of the Monitoring Unit were transferred, and some were fired.

Another factor is the excessively high production quotas assigned to different operators, who must work overtime to be able to fill these quotas and enjoy the incentives offered by the company.

In some extreme cases, workers work overtime to meet the assigned production goal and to receive the pay incentives, but they do not always receive all of the pay for each extra hour worked, because, according to some personnel chiefs, "if the worker does not reach the goal during the ordinary work day, they are obliged to work overtime, at their own expense."

Another cause for overtime work is the lack of coordination between the Planning and Production Departments at some companies. According to technical personnel in those departments, on some occasions the operators do not have the necessary materials to carry out their tasks. For example, they may lack thread, zippers, etc. Workers fall behind as a result, and must work overtime to complete the production goals.

It is revealing that the Ministry of Labor itself recognizes the illegality of obligatory overtime work in the textile maquilas. Obligatory overtime also occurs in other sectors, however. In the financial system, bank personnel cannot leave until the safe is locked, and when this implies staying late, it is frequently unpaid. Security personnel experience the same problem. Accounting departments are frequently understaffed and thus the employees must work overtime to finish tasks. Public transport drivers work up to 12 hours daily, and their fatigue causes accidents.

The dominance of the laws of the market mean the flexibilization of labor practices, in which "schedule availability", meaning obligatory overtime, is a basic requirement for being hired.

d) Conclusion

We note the following obstacles:

Legal Obstacles

Lack of a sanction for failing to comply with the law

There are no legal problems; by law, it is clear that overtime is not obligatory. The Achilles' heel of the law is the fact that it does not assign a sanction to employers that force their workers to work overtime. It also does not protect workers who are fired for refusing to work extra hours.

Political Obstacles

Favoring investment

The Salvadoran government has publicly stated that the maquilas demonstrate the advancements in the country's development, because they bring direct and indirect employment to a country with a high level of unemployment.

Practical Obstacles

Crisis in the family economy

The scarcity of jobs, low salaries, and high cost of living are factors that force workers to submit themselves to inhumane working conditions. It is not uncommon to be unemployed, and so when people find a job, they are obliged to agree to work overtime to keep the position or to earn more money.

V. Decent Working Conditions

Below we will look at three aspects that are relevant to decent working conditions: occupational safety and hygiene, mistreatment and abuse in the workplace, and the closure of companies without the full payment of their debts.

Occupational safety and hygiene

a) Applicable international and national legal norms

Occupational safety and hygiene refers to the prevention of work-related risks, injuries, and illnesses. Adopting hygiene measures in the workplace is one of the most common ways of assuring workers' health. From an economic point of view, hygiene policies contribute to increased production by avoiding absenteeism due to illnesses and accidents. Such policies address cleanliness, disinfection, lighting, ventilation, and heating in the workplace, as well as the conditions of cafeterias and changing rooms.

Article 44 of the Salvadoran Constitution refers to hygiene in the workplace when it says *"The law will regulate the conditions in the workshops, factories, and workplaces. The State will have a technical inspection service in charge of monitoring compliance with the legal norms...to examine the results and suggest reforms."*

The third book of the Labor Code, which relates to Social Security, addresses occupational health and safety by listing the obligations of employers (Art. 314) and workers (Art. 315). It indicates that employers should adopt and put into practice adequate safety and hygiene measures to protect the lives, health, and physical integrity of their workers, especially with regard to:

- 1) The work operations and processes;
- 2) The supply, use, and maintenance of personal protective gear;
- 3) The buildings, installations, and environmental conditions; and
- 4) The placement and maintenance of equipment to prevent or isolate dangers related to machines and other installations.

Workers, on the other hand, have the legal obligation to:

- 1) Comply with health and safety norms and technical recommendations referring to the use and maintenance of personal protective gear, work processes, and the use and maintenance of machine-related protection;
- 2) Comply with employers' instructions that aim to protect their life, health, and physical integrity;
- 3) Collaborate with the safety committees.

The issue of safety and hygiene is so important, that if a worker consistently does not comply with the regulations or indications of his employer, he can be fired without compensation (Art. 50 No. 17 Labor Code). In the same way, if the employer puts the life or health of his workers in grave danger because of the working conditions or by failing to comply with legally prescribed measures, the worker can leave his position and receive full compensation, giving the employer the responsibility for the dismissal (Art. 53 No. 7 Labor Code).

This is legally supported by the General Labor Inspectorate, as indicated by Article 34: *"The inspection work has the objective of monitoring compliance with the legal labor regulations and basic occupational health and safety norms, as a way of preventing labor conflicts and ensuring safety in the workplace."*

There are two types of materials that aim to sanction violations of occupational safety and hygiene standards. Article 244 of the Criminal Code says that *"He who, through deceit or abuse of a needy situation, submits workers to his service under labor conditions that endanger, eliminate, or restrict the rights recognized by law or individual or collective work contracts, will be punished with 6 months to 2 years in prison."*

In addition, Article 278 says *"He who, being obligated to do so, does not adopt the necessary measures to allow workers to carry out their activities with the required safety and hygiene measures, violating the laws on the prevention of work-related risks, putting workers' health and physical integrity at risk, will be sanctioned with a fine of 50-100 days. Employers who do not observe safety, hygiene, and risk prevention measures in centers dedicated to health or public or private education will face the same fine."*

b) Cases of violations of health and safety standards in the workplace

Case of intoxication at Olocuilta

What "should be", as established by law, differs greatly from reality. Occupational health and safety conditions are generally nonexistent in the workplace. This affirmation is supported by two sources: first, a report by the Ministry of Labor, and second, the journalistic and legal chronology of the intoxication incident in the Export Processing Zone in Olocuilta, in the department of La Paz.

According to the July 2000 report by the Unit on Monitoring and Analysis of Labor Relations of the Ministry of Labor¹⁰⁸, a field study concluded: *"The workers at the different companies said that they do not have the minimum occupational safety and hygiene conditions.*

In many cases, they are not given suitable safety equipment that is necessary to protect their health in different risk areas, including: masks, gloves, respirators for using chemicals, belts for carrying heavy materials, etc.

There are also problems with the conditions of the physical working environment. For example, excessive heat is generated both by external sources (sunlight) and internal sources (machine radiation, overcrowding, ironing equipment, and poor ventilation). This can create stress, exhaustion, and illnesses.

Another effect of poor ventilation is the excess dust that accumulates on walls, ceilings, machines, and personnel in the production plant. Most companies lack a dust-collection system that could prevent such accumulation. Extreme contact with these suspended particles can cause pulmonary fibrosis or other health problems.

Another notorious problem is the lack of an ergonomic study of the distribution of working positions in relation to the tasks of each worker. This leads to a loss in production time, unnecessary or forced movements, and bad positioning, making operators experience muscle fatigue."

These conclusions are revealing. They refer to an official diagnostic study on the violation of health and safety standards in the workplace. After clarifying the panorama, however, they don't do anything to remedy the problems.

According to official data from the Ministry of Public Health, there were 23,496 work accidents in 2001. Most of the affected workers (17,302) were men between the ages of 20 and 59.

The Ministry of Labor's 2000 conclusions, and their lack of an efficient response, contributed to the mass intoxication incident that occurred in the maquila sector in 2002. This case is presented here to demonstrate the lack of concern for occupational safety and health.

Case of mass intoxication in the Export Processing Zone in the municipality of Olocuilta, Department of La Paz

On July 5, 2002, at 1 pm, a tube carrying chlorine in the ironing area of the textile maquila Hoons Apparel ruptured, affecting 6 factories in the industrial complex.

¹⁰⁸ "Informe de Monitoreo de las Maquilas y Recintos Fiscales". Unidad de Monitoreo y Análisis de las Relaciones Laborales del Ministerio de Trabajo y Previsión Social, July 2000. Page 10. Research supported by USAID/SETEFE/Ministry of Labor.

Approximately 260 workers were taken to a hospital in San Salvador. Twelve of these workers were pregnant women in critical condition *¹⁰⁹.

According to the law on the Organization and Functions of the Labor Sector, Article 65, when the gravity or imminence of danger merits it, the Director General -Lic. Walter Palacios- can ask the General Labor Inspectorate to close down all or some of the sections of a given workplace, or prohibit the use of certain machines or equipment that put workers' lives, health, or physical integrity at risk. This same regulation prescribes the process that should be followed. First, the Director General of the Labor Inspectorate must listen to the interested party by the second day, open an investigation into the incident within 4 days if the interested party requests it, and announce a resolution within the 2 days following the hearing. If the resolution orders the closing of certain locations or the removal of dangerous objects or machines, an appeal is allowed before the Ministry of Labor, as long as it is filed within two days following the notification. The Ministry will use the procedure for appeals established in the Labor Code.

Even though the procedure is clear, the Director General and Ministry of Labor did not consult the law and apply it clearly. The latent causes for the intoxication continued, and on July 8, a new intoxication occurred in the same location. This time, 300 workers were affected*¹¹⁰.

After these lamentable incidents, **the public officials who were not in the place where the incident occurred** started to release irresponsible declarations that sought to avoid an exhaustive investigation and the identification of the responsible parties. Vice President Carlos Quintanilla Smith said the possibility of it being an act of sabotage should not be ruled out*¹¹¹. Minister of Labor Jorge Isidoro Nieto Menéndez and the head of the Institute of Legal Medicine, Juan Matheu Llor, said that it was a case of collective hysteria*¹¹². The Minister confirmed that *"There is no gas or toxic elements, there are no positive results that it is chlorine, there is no chemical in the company that could affect*

¹⁰⁹ Different news articles published July 6, 2002 referred to the incident. "Solicitan investigación sobre el hecho. Masiva intoxicación por cloro", El Diario de Hoy, Pgs 14- 15. "En zona franca de Olocuilta. 260 personas intoxicadas por fuga de gases en maquila," La Prensa Gráfica, Pgs 14- 15. "Masiva intoxicación en maquila de Olocuilta", Co Latino, Page. 3. "31 personas continúan en observación. DE alta la mayoría de 350 intoxicados", El Mundo, Page. 3.

¹¹⁰ News articles reporting on the incident: "Nueva intoxicación masiva en la zona franca de Olocuilta", July 8, 2002, Co Latino, Pages 1 and 2. "Nueva Intoxicación masiva en maquila", July 8, 2002, in El Mundo, Pages 1 and 3. "Caos vuelve a zona franca. Otra masiva evacuación", July 9, 2002 en El Diario de Hoy, pages 2 y 3. "Extraña intoxicación en maquilas de Olocuilta", July 9, 2002, Pages 4 - 6. "Empleados de cinco maquilas de Olocuilta, fueron afectados. Otra intoxicación", July 9, 2002, el Más, Page 3.

¹¹¹ News article titled "Podrían sancionar a empresa maquilera. En la misma fábrica 'Hoons' se reporta otra intoxicación", July 8, 2002 Co Latino, page 2. The Vice president says that there would be studies done to verify if the intoxication was caused by negligence, although he would not discount the possibility of it being an act of sabotage.

¹¹² News article titled "Ministro de Trabajo atribuye el hecho a una 'histeria colectiva'. Nueva intoxicación masiva en maquila", July 8, 2002 El Mundo, page 3. "Sospechan de sabotaje. Fue una histeria colectiva", July 9, 2002 El Diario de Hoy, page 3. "COEN afirma: Trabajadoras de maquila son víctimas 'Histeria Colectiva'", July 9, 2002 Co Latino, page. 2. "Gobierno dice que es una histeria colectiva. Descartan intoxicación por sustancia química", July 9, 2002, el Más, page 4.

one's health". Supporting these positions, the Executive Director of the Salvadoran Association of the Clothing Industry (ASIC) said that *"We support the possibility of it being an act of sabotage that took advantage of the visit of international unionists"*^{*113}, referring to the visit of unionist Neil Kearney, Secretary General of the International Textile, Garment and Leather Workers' Federation. The most extreme position was taken by the laboratory technicians, who said they had *"found elements showing that mass intoxication was caused by tear gas bombs thrown at the maquila installations"*^{*114}. This contradicts the studies done by the Fiscalía which stated that *"Rafael Calderón Calderón, Head of the Fiscal Unit on Health and the Environment, headquartered in San Vicente, affirmed that there is as yet no evidence of the cause of the vomiting and other symptoms."*

The people who were actually in the place the tragedy occurred established with more certainty how the incident happened. According to the affected workers^{*115}: *"In the maquila we worked with liquid chlorine every day, to remove stains from clothing. That was done in the mentioned area, where the first cases of intoxication occurred. According to some workers, the chlorine problems started on Thursday with some coworkers showing symptoms of dizziness and fainting."* Members of the national firefighters squad present in that place later said that *"going through the maquila installations showed that the contamination could have been due to a liquid chlorine spill. Chlorine causes dizziness, vomiting, fainting, itchiness; the affected workers showed these symptoms."*^{*116}. Similarly, a representative from the Salvadoran Red Cross stated, *"The mass intoxication...was due to a leakage of chlorine or bleach and chemicals used in the factory. The first victims of the intoxication were taken to the Health Unit in Olocuilta. They showed symptoms such as vomiting, difficulty breathing, and fainting"*^{*117}. Clearly there is a contradiction between the accounts of the public officials and the affected workers.

After the second intoxication, Ministry of Labor officials continued to avoid an investigation. The Labor Commission of the Legislative Assembly had to summon the officials of the Ministry of Labor and the Ministry of the Environment^{*118}, who appeared before the Commission on July 10, 2002.

At 11:20 on July 17, the legislative arm of the FMLN presented a formal complaint against the Ministry of Labor to Fiscal General, Lic. Belisario Artiga. The complaint

¹¹³ News article titled *"Extraña intoxicación en maquilas de Olocuilta"*, July 9, 2002 *La Prensa Gráfica*, page 19.

¹¹⁴ News article titled *"Mano peluda. Medicina Legal: bomba lacrimógena intoxicó en maquila"*, July 9, 2002, *El Mundo*, page 4.

¹¹⁵ News article titled *"Solicitan investigación sobre el hecho. Masiva intoxicación por cloro"*, July 6, 2002 *El Diario de Hoy*, page 14.

¹¹⁶ News article titled *"Tres barriles"*, July 6, 2002 *La Prensa Gráfica*, page 15; refers to the first declarations made by Firefighter Sergeant Luis Monterrosa at the site of the intoxication.

¹¹⁷ News article titled: *"En maquila de Olocuilta centenares de intoxicados"*, July 6, 2002 *Más*, which refers to a chlorine leak that intoxicated 300 women in the Hoon's maquila. The factory was closed and the affected workers filled up a health unit and hospitals.

¹¹⁸ News article titled: *"Por intoxicación en maquila FMLN pide citar a titular de trabajo"*, July 9, 2002, *Co Latino*, page 3.

accused the Ministry of having failed to comply with their responsibilities, as per Article 321 of the Criminal Code. To date there has still not been a full clarification of the intoxication, nor has the complaint against the Ministry proceeded. Those responsible for the incident are enjoying full impunity.

Organizations like the Foundation for Studies on the Application of Law (Fundación de Estudios para la Aplicación del Derecho, FESPAD), the Human Rights Institute at the Central American University "José Simeón Cañas" (IDHUCA), and the Permanent Committee of Independent Rural and Professional Women (DIGNAS, ORMUSA, MELIDAS, GMIES, FUNDE, MSM), denounced these events. FESPAD said^{*119}: *"We deplore the flippancy with which some officials evaluated what happened in the maquila, without providing any scientific data to support their conclusions, which raises questions about their aptitude and responsibility."*

As a result, we propose:

- *The creation of an investigative committee to study the events that occurred in the Export Processing Zone in Olocuilta. The committee should include the active participation of NGOs linked to labor issues, unions, workers, the Ministry of Labor and the ASIC. The report should be made public.*
- *That the Ministry of Labor publicizes the results of the inspections done in that Export Processing Zone and especially in the Hoon's Apparel and Sharter maquilas;*
- *That those responsible be identified, both on a company level and at the governmental level."*

IDHUCA^{*120} Executive Director Benjamín Cuellar demanded an in-depth investigation of the events: *"What the Salvadoran State has done so far is ridiculous, failing to comply with its responsibilities, defending other interests, saying that after 7 days they still don't even know who the factory owners are. I don't believe that the Fiscalía, with its current leadership, has the capacity to distance itself from the ridiculous situation that the rest of the administration has created. The government has jumped from one explanation to another, without basis or scientific foundations...to defend those who have economic power."*

Women's organizations published a document titled "2001 Investigation Demonstrates Risks for Hoon's Apparel Workers"^{*121}. The document stated: *"We see this incident as a clear example of the terrible working conditions that workers face; this situation has been denounced for years through studies and investigations by different institutions interested in monitoring this economic activity. These studies include the report by the Monitoring Unit that the Ministry of Labor produced, which was not distributed."*

¹¹⁹ FESPAD communication: "A propósito de la intoxicación en la maquila". July 10, 2002, *El Diario de Hoy*, pages 43.

¹²⁰ News article titled: "Una investigación a fondo sobre el incidente en las maquilas. Trabajadores salvadoreños sin protección Estatal", July 11, 2002 *Co Latino*, page 3.

¹²¹ Comunicado de las DIGNAS, ORMUSA, MELIDAS, GMIES, FUNDE, CORAMS y MSM. MESA PERMANENTE DE MUJERES RURALES Y PROFESIONALES INDEPENDIENTES: "Investigación del año 2001 demostraba riesgos para las trabajadoras de Hoon's Apparel", July 12, 2002, *Co Latino*, Page. 9.

We observe, with much indignation, the declarations that came first from the Ministry of Labor personnel responsible for monitoring the implementation of industrial safety systems, which irresponsibly proposed the existence of sabotage or collective hysteria in order to avoid its responsibility, and clearly defended the employers' interests.

In order to demonstrate that what happened to women at Hoon's Apparel was not sabotage, we present the main results of a study by ORMUSA, one of the organizations belonging to this committee, which was done in this export processing zone between November 2001 and May 2002 and which focused on Hoon's Apparel.

- *Only 20% of the workers signed a work contract and were given a copy.*
- *Their shift is from 6:40 a.m. to 6:30 p.m.*
- *The factory does not have air conditioning. The ventilation is inadequate, causing excessive heat. The dust from the cloth circulates throughout the installations, causing workers to experience severe respiratory problems.*
- *Even though the company has potable water from AND, some workers stated that the water has a bad taste and odor.*
- *The company does not give workers an area for eating. It has contracted a private fast food company to sell food to the workers, which is an economic disadvantage for them.*
- *Workers are illegally forced to remain inside the factory during their 30-minute recess, because the exit is kept permanently locked.*
- *Workers are not allowed to unionize, under threat of dismissal.*

This information shows the existence of fundamental labor rights violations, the existence of poor working conditions, and the fact that the company does not respect the laws established by the Labor Code. It also shows the Ministry of Labor's failure to fulfill their responsibility to monitor compliance with the established norms."

These events demonstrate the weakness of the legal system and the lack of political will to respond to occupational safety and hygiene issues.

Mistreatment and abuse in the workplace

a) Applicable international and national legal norms

Article 29 of the Labor Code lists employers' obligations, including "Giving workers due consideration, and refraining from physically or verbally mistreating them." This obligation is obvious: no employer has the right to take advantage of their hierarchically superior position, and the workers' need for employment, to step on their dignity. Article 53 of the Labor Code recognizes that such abuse is a reason for workers to be able to terminate their work contract while giving the employer the responsibility for such action: "The worker will have the right to end the work contract, holding the employer responsible, for the following causes:

3º) *If the employer, in the workplace, commits acts against the worker or group of workers, or against all company personnel, acts that gravely hurt their dignity, feelings, or moral principles;*

4º) *For verbal or physical mistreatment by the employer or head of the company or establishment against the worker or against his partner, descendants, or brothers, when the employer is aware of the family relationship."*

There are three main types of abuse in the workplace: first, using pressure, threats, or intimidation to make workers complete high production goals; second, discrimination against unionized workers; and third, sexual harassment.

In terms of discrimination against unionized workers, Article 30 of the Labor Code says: *"Employers are prohibited from...5) Indirectly or directly discriminating against unionized workers or retaliating against them for the same reason."* Despite this prohibition, unionized workers today frequently experience discrimination, threats, and dismissal.

Finally, with regard to sexual harassment in the workplace, Article 165 of the Criminal Code states: *"He who realizes sexual behavior that is unwanted by the receiver, which implies touching or other conduct of a sexual nature, will be punished with six months to one year in prison. Sexual harassment of a minor under the age of 12 will be punished with six months to two years in prison. If the sexual harassment takes advantage of a hierarchical relationship there will also be a fine of 30-50 days imposed."*

In the textile maquilas, there are many young women under the age of 25, who are not well educated. These women are frequently the victims of sexual abuse, insinuations, and proposals of a sexual nature. These incidents are not reported because the women are unaware of the legal procedure, fear being fired, are pressured by the company's lawyers, and because the *machista* culture says that women are responsible for provoking and permitting such acts.

b) Cases of sexual harassment

The Ministry of Labor report referred to earlier also addresses mistreatment*¹²²: *"Mistreatment of workers. Most interviewed workers said they had been the victims of mistreatment by bosses within the company, particularly their supervisors, who gave instructions in an arrogant manner, using expressions that hurt workers' dignity, thereby violating part 5 of Article 29 in the Labor Code."*

They also informed us that supervisors frequently threaten to fire the workers that do not complete the assigned production goal or who are not willing to work overtime. This creates uncertainty and unhappiness among the workers, who complain about the

¹²² Opus City, page 12.

psychological pressures that affect their health. This situation creates conflicts between supervisors and operators."

This report confirms the claims made in previous sections of this document, including the impunity enjoyed by those responsible for abuse and mistreatment in the workplace.

One sensitive point is the existence of cases regarding sexual harassment in the workplace. Workers in the textile maquila Doal Enterprises S.A. de C.V., which has plants in San Marcos and Nueva San Salvador, have filed complaints with the Fiscalía regarding Korean supervisors and managers who sexually harass the operators. The sexual harassment is often accompanied by threats that the victims will be fired or demoted. The women who have been brave enough to file these complaints have been supported by their families, women's organizations, or by their union. Nevertheless, the two known cases ended with the firing of the female workers.

Companies closing without paying liabilities

The sudden closure of companies has become increasingly common in El Salvador. The owners of these companies disappear, while still owing salaries, vacation pay, benefits, social security payments, etc.

a) Applicable international and national legal norms

Article 29 of the Labor Code says that employer's first obligation is: *"To pay the worker their salary according to the quantity, date, and place established in Chapter One of this book."* This fundamental right enjoys special protection. Article 127 requires that salary payments be made at the right time, in whole, and in person.

Salvadoran labor law also recognizes that workers who agree to work on the day that the law or work contract has indicated to be a rest day will have the right to 150% of their normal pay for that day's work, as well as one compensatory day of paid rest (Article 175, Labor Code).

Article 38, part 5 of the Constitution recognizes that employers will give their workers a bonus for each year's work. The law establishes how the quantity will be determined based on the workers' salaries. This same right is also included in the Labor Code, Articles 196-202.

The Labor Code (Articles 177-189) also recognizes workers' right to paid annual vacation days. This is also an important way to protect workers' health.

Finally, Article 58 of the Labor Code refers to workers' right to compensation when they lose their jobs for a reason attributable to the employer.

The Reality:

Despite the clear language of these laws, many companies have closed in the past three years, with the employers leaving without paying the workers. In the past two years, textile maquilas Laitex, Newtex, Tainan, Anthony Fashion, Mai and Carolina Apparel closed their operations without warning their workers. The owners of these companies fled the country, owing salaries, vacation pay, bonuses and compensation. Over 3,500 workers lost their jobs in these companies. The Ministry of Labor did not act to defend the workers' rights; instead, they acted complicity with the business owners.

The case of Carolina Apparel provides a useful illustration.

Carolina Apparel, an apparel maquila owned by U.S. businessman Jeff Rivas, had for several months made unlawful withholdings from the paychecks of the workers. These included wages, confiscation of social security deductions and pension and confiscation of payments to banks that workers had directed to be deducted from their paychecks. The workers reported these violations to the Ministry of Labor, who failed to take any action to investigate the claims raised. At a loss, the workers, not having received wages for the last three weeks, demanded that the company pay them for their back wages. The company responded on December 12, 2003, stating that the company was bankrupt and that the factory would close. Over 350 workers were subsequently unemployed.

BA to add dates

Individual cases for wages and benefits were filed with the Ministry of Labor, as well as a collective case with the Procuraduría de Derechos Humanos. Under the Export Processing Zone law, an employer who completely closes an operation must allow the goods to be embargoed to pay off all salaries owed. On December 23, a preventative embargo was finally issued and the goods seized, due largely to the fact that the factory workers stayed at the factory from the 12th to the 23rd to guard the machinery and prevent the company from removing them.

However, the workers still face perhaps insurmountable obstacles. Currently, the company has no legal representatives in El Salvador, which prevents the court from serving notice upon the company. As such, the individual cases may be dismissed for the fact that service of process cannot be effected. Moreover, even if the machinery is sold pursuant to the embargo under the collective case, the proceeds will cover one week's salary, far short of what is due.

Source: Las Melidas (MAM), El Salvador.

c) Conclusion

We note the following obstacles:

Legal Obstacles

Incipient legal norms for responding to such problems.

Neither the Labor Code, nor the law on export processing zones, nor the law on the organization and functions of the labor and social security sector, nor the Penal Code adequately address the need to prevent foreign investors from abandoning the country owing payments. The same thing happens with cases of sexual harassment or rape in the workplace: there is no criminal process to receive the complaint, develop an investigation, adopt measures to protect the victim, or apply the corresponding sanctions.

A general law that dates from 1971 governs cases of occupational safety and hygiene. This legal norm is now obsolete and does not contain the sufficient elements to avoid health risks for workers and to sanction those responsible for violations.

Political Obstacles

Efforts to cover up the problems

Grave violations of labor rights are addressed in a way that generates some publicity but does not really resolve the problem. For example, they will promise an investigation and punishment, but these never happen. In other cases, they will accuse the political opposition of causing the problem. The political obstacle therefore is government officials' lack of interest in confronting the problems and punishing those responsible. Instead, they choose to cover up the problems.

Practical Obstacles

An institutionalized culture of disrespect for labor rights

Jobs are scarcer every day, which means that they are only available to those workers who are willing to be exploited and mistreated and who will not attempt to organize. This tendency is institutionalized when there are no legal elements or administrative, political, or judicial spaces adequate to respond to the problem.

VI. INSTITUTIONAL CONCERNS

In this section we present a snap shot of how labor laws are applied in three areas: 1) the judiciary, 2) the administrative body and 3) the Public Ministry.

1. The Judiciary

As the Judicial Law establishes, there are 8 labor courts in the country that hear labor conflicts in the first instance. These tribunals are located as follows: 4 in San Salvador, 1 in Nueva San Salvador, 1 in Santa Ana, 1 in Sonsonate & 1 in San Miguel.

Between January 1998 and June 2003, the 7 labor courts (not including San Miguel) received a total of 26,993 cases, of which 15,998 were filed by men and 10,995 were filed by women.

During this time, the 4 labor courts in San Salvador received 20,828 cases, of which 8,630 were filed by women and 12,198 by men. The court in Sonsonate received the fewest cases during those months, with only 1,424, of which 415 were men and 1009 filed by women.

In terms of sectors that lead to the greatest number of lawsuits, the maquila sector is one with the greatest number of cases filed: 4,860 were filed in the months mentioned, of which 1,237 were filed by men and 3,623 by women. To this quantity we also have to add the cases against private persons, which total 5,910 of which 3,460 were filed by men and 2,450 by women. The majority of these cases involve small maquila shops subcontracted by larger maquilas. We can conclude that the maquila sector generates the most employment and also the most dismissals and a high level of insecurity in terms of labor law. The industrial sector had the second highest number of cases filed, with a total of 5,082 of which 3,305 were filed by men and 1,777 by women.

Most of the cases in the labor courts seek compensation for dismissals, and the second most common cause is salaries withheld by employers, dismissals of union leaders and pregnant women, which is a clear reflection of the legal insecurities in these sectors and the lack of job stability.

In terms of cases presented to the Civil Service Tribunal regarding the public sector, between 1998 and June 2003 there were a total of 767 cases filed, of which 564 were filed by men and 203 by women. The most frequent cases filed by men dealt with lay offs, destitution and injustices. The same applies for women, but in their cases, the most frequent cause were various injustices, followed by layoffs, followed by destitution, followed by lay offs.

The sector most referred to in cases presented to the Civil Service Tribunal in 1998 was the Department of the Interior; in 1999 it was the Department of Labor; in 2000 it was the Ministry of Public Works; in 2001 it was the Ministry of the Interior; in 2002 it was the Ministry of Public Health and Social Work; and in 2003 it was the Ministry of the Environment. The exact numbers are listed in the appendix.

Of the judgments issued by the Civil Service Tribunal in 1998, 53.75% were in favor of workers and 46.25% were in favor of the boss or government institution. In 1999, 53.33% were in favor of workers and 46.67% were in favor of the boss or government institution. In 2000 the percentages were reversed, because 44.26% of the decisions were in favor of workers and 55.74% were in favor of the boss. 2002 was the exception to the rule, because there were many dismissals in the public sector, and only 24.51% of the decisions were in favor of workers and 75.49% were in favor of the public entities.

Most labor organizations trying to defend union rights turn to the Supreme Court. The departments most sued are the Department of Labor and Social Security, and the National Department of Social Organizations, because of arbitrary decisions taken by these bodies.

2. Administrative Matters

To reference administrative issues regarding labor rights infringements we must look at three areas: The Commission of Labor and Social Security of the Legislative Assembly, the Department of Labor and Social Security and the Civil Service Commissions.

With respects to the Commission of Labor of the Legislative Assembly, which has received 155 letters, 41 of which were written by unions, 40 by individual workers and 74 by State entities. Public institutions filed 74 of these cases. Of this total, 74 of them requested formal investigations against public administration workers. Thirty six of them are accusations of labor rights violations, 23 are requests to guarantee job security, 10 suits deal with lay offs, 8 deal with reinstatement requests, 3 request labor law reforms and 1 suit asks for a formal recommendation regarding a labor law matter.

The Executive Branch receives the most number of complaints. Throughout the past five and a half years, 59 suits go against various government departments, 52 suits are against presidents of official autonomous institutions, 21 are against the Legislative Assembly, 2 against district attorneys, 5 are against municipalities, 12 are against specific corporations, 3 are against the Executive Branch in general.

The Committee on Labor and Social Security receives the complaints, studies them, requests a response from the sued parties and finally issues recommendations or decrees that aim to solve the conflict.

The Civil Service Commissions examine conflicts in the area of labor rights, often working as arbitrators or mediators who attempt to solve problems in a non-confrontational way. When their efforts fail, the case goes to the Civil Service Tribunal.

The information regarding Civil Service Commissions is varied. We only know that in the year 2000, there were 77 integrated Civil Service Commissions, 43 in the process of being integrated and 42 commission integration proposals. In 2001, 89 commissions were integrated, 32 in the process of being integrated. Finally, in 2002, 74 commissions were integrated and 32 were in the process of being integrated.

3. Public Ministry

Between January and July of 2003, the Attorney General's Office issued 3,322 judgments regarding labor conflicts, 1,554 of these were cases filed by women, 1,768 filed by men.

At the same time, the Department of Labor examined 52 cases, 15 of which were requested by women, 37 requested by men.

Also, in the same time period, the Attorney General's Office issued 77 protective orders (*amparo*) 15 cases brought to the Teaching Career Tribunal, 15 in Civil Service Commissions, 3 in the Civil Service Tribunal, 3 Administrative Contentions cases, and 2 regarding the Law Guaranteeing Public Sector Workers the right to Legal Recourse.

The Attorney General's Office handled 3,579 labor conflict cases, 1,648 filed by women and 1,931 filed by men from January to July 2003.

In 1998, the Human Rights Office, through the Adjunct Labor Rights Office saw 239 complaints filed for illegal labor practices that affected job stability in the public and private sectors. The government Departments (Labor, Treasury, etc...) that make up the Executive Branch were most commonly sued for labor rights violations, with 119 suits (49.79% of the cases). Municipal governments were the second most sued bodies, with 40 cases (16.74%). In 1999, the Human Rights Office received 136 cases for the same reasons, and 68 of them were against government Departments. In 2000, there were 148 cases, 72 of which were directed against government Departments. In 2001, 76 of the 155 cases were filed against government departments and finally in 2002, 63 of the 133 cases were filed against government departments.

A common trend we see in labor rights cases against government departments is the illegal retention salaries owed to workers. In 1998, the Human Rights Office received 56 cases, 34 of which were filed against government departments. In 1999, 38 cases were received; in 2000, 22 cases, in 2001, 36 cases, and in 2002, 54. In all of these cases, the government departments were most often sued.

Cases regarding violations of labor union rights are not common in the Human Rights Office. Workers still don't recognize that this Office can handle such cases.

It was not possible to access case files from the Inspector General's Office (Fiscalía General de la República), but from what we gathered, the office has only handled cases relating to "Coercion in the Exercise of Union Freedoms", or infringements to the right to strike. There were at least 89 cases presented in different courts, and none was successful.

With this information we can make 4 basic conclusions: first, that women use administrative, judicial, or public department courts less than men to defend their labor rights and union rights, which could indicate the difficulty in accessing these spaces or indicate problems regarding self-esteem; Second, that maquila, industry, and commerce sectors in the private sector face the greatest number of complaints for violating labor rights, and in government's various departments are often experiencing these complaints. Third, it is clear that there is inefficient usage of the different Government Offices (Human Rights, Attorney General, etc...) equipped to handle cases of labor rights abuses. Apparently, questions regarding the different offices' honesty marginalizes their usage. Fourth, that the most common reasons for complaints stem from problems of illegal salary retention, or other causes such as the lay off of pregnant workers or union directors. In the public sector, most suits seek to overturn lay offs.

The number of cases presented to the courts or the Attorney General's Office does not really reflect the number of people whose rights have been violated. In 2001, 900 workers from the Newtex company were fired, as well as 1500 workers from the maquila textile factory Anthony Fashion. The labor courts have not received the 2,400 cases that could stem from these incidents. In practice, workers think that these administrative and judicial

processes do not really solve their problems, which is why they stop using them and prefer to resign themselves to the violation of their labor rights.

VII. Conclusions and Recommendations

As the foregoing report has demonstrated, El Salvador faces serious challenges living up to its national and international obligations to enforce workers' rights. El Salvador has been particularly egregious in its violation of the fundamental rights of freedom of association and collective bargaining. El Salvador also has major obstacles to overcome in living up to its obligation to eliminate child labor, particularly the worst forms of child labor. The recommendations below address particular issues that must be addressed.

No. 1: Adaptation and Development of the Labor Laws

Of critical importance, El Salvador must adapt and develop the country's existing labor laws with the aim to preserve and protect the fundamental labor rights. The importance of strong laws and regulations must be emphasized given the increased flexibility in the labor market; there has been a marked tendency to deregulate the labor market, that is to reduce and in some cases eliminate the rules regulating labor relations. Businesses, the Department of Labor and Social Security and legislators from the governing party have developed a series of proposals aimed at such deregulation, including the "Special Law for the Reactivation of Jobs," which would modify the individual contract system, and the "Professional Training Law," which would reform Article 41 of the Constitution and eliminate the chapter of the Labor Code dealing with apprenticeships (Articles 61 - 70). There are other proposals, for example by the Dressmaking Industry Association of El Salvador (ASIC), which wants a minimum wage of c700.00 in factories that move to the Export Processing Zones.

One must strive to create strong and effective legislation to better safeguard labor and union rights. Such proposals include:

- a) Undertake a comprehensive study of the country's labor laws with the purpose of creating reforms that better safeguard labor rights and create a shift in the administrative/jurisdictional procedures in terms of labor rights;
- b) Create parallel reports, with reliable and credible information about the compliance with or violation of ILO Conventions ratified by our country, as well as other international pacts and treaties.
- c) Undertake to form a permanent relationship with the Department of Labor Rights of the General Ombudsman of El Salvador.
- d) Encourage active participation of labor union leaders in the administrative procedures to better defend the labor and union rights of their union members.

- e) Increased contact between labor union leaders and legislators from across all political parties in order to better inform lawmakers of the needs of workers;
- f) Establish greater contact between union leaders and labor court judges in order to better understand the legal process and to better present their case to the judges;

No. 2: Rescuing the Legal System with Respects to Labor Rights

In this report we have shown with credible data that the Department of Labor and Social Security is one of the country's largest violators of labor rights violators. Indeed, the department routinely disobeys the laws it is charged to protect. The concern is that in a country that strives towards freedom, democracy and respect for human rights law will have public institutions that enforces rather than violates those rights. This fact also has been confirmed several times by international organizations such as the ILO. Therefore, there must be some effort to back some modicum of credibility to the Department of Labor and Social Security.

- a) Initiate a personnel review process to make sure the workers of the Department of Labor and Social Security are honest and know the law;
- b) The Department staff should be reorganized, especially those working under the Inspections General who have routinely come under questioning because of allegations of corruption;
- c) Create a culture within the Department of Labor and Social Security against corrupt practices and encourage workers to speak out against corruption;
- d) The Minister and Vice Minister should facilitate communication between the people and organizations and the government in order to better understand their grievances, proposals, etc. It is important to maintain open and honest dialogue between all parties.
- e) Pay more attention within the Department of Labor and Social Security to issues critical to labor rights. Conciliation and arbitration are resources poorly used by the Department. Lack of training and at times lack of interest by the part of the Department's workers is discouraging.
- f) Include input from workers on proposals concerning labor relations and labor rights who, after all, will always be affected greatly by the reforms.
- g) The Department of Labor and Social Security needs more adequate funding. Its current resources aren't nearly enough to cope with the challenges it faces.

These same recommendations should be made to the courts. Cases before the Labor Court and Supreme Court take too long. The outdated procedures used in the courtrooms

date back to more than 30 years ago. Labor Courts as well as the Supreme Court should experience some reforms to make the procedures more efficient and transparent.

Additionally, the Civil Service Tribunal does not have an adequate budget, nor does it have proper installations, or sufficient personnel. Moreover, the structure of the Tribunal (members of the Executive, Judicial and Legislative branches) often make political decisions rather than technical or judicial decisions.

The Attorney General's Office, the Office of Human Rights and the Inspector General's Office, with their lack of resources and lack of desire by the part of their workers to defend the rights of the population are mistrusted by society, and as such are seldom sought after when ever violations occur.

It is for these reasons why these institutions lack credibility with respects to labor rights. Simply because these legal bodies lack financial and material resources, personnel or desire to protect the rights of workers does not mean that injustice should reign.

No. 3: *The Union Movement*

Finally, another aspect of the issue that requires profound debate is the Salvadorian union movement. Currently, the union movement faces a loss of organizational powers; the lack of initiatives and options to counter the economic changes in the private and public sectors; corruption of certain union directors who help to maintain the status quo; the lack of strong participation by women; the lack of understanding of the legal options and procedures needed to seek justice for labor violations; and the absence of a forum where union members can share their grievances.

The following are proposals aimed at serving those truly interested in the resurgence of the labor union movement.

- a) Obtain a clear picture of the size of the Salvadorian union movement and undertake a diagnosis of the union movement's condition pointing out the strengths and weaknesses;
- b) Labor unions should actively seek to organize;
- c) The unions need to rethink their organizational methods, and improve communication between union members and their leaders;
- d) Increased training of union members in legal matters to better understand the legal process and to better use the resources available to them when violations occur;
- e) Improve communication between union members, leaders and the community. A labor union should be more than a group of workers uniting for their collective rights; it should also be a movement that strives to protect the rights of those who consume their products;

- f) Finally, there must also be improved communication between unions and members of the national media and the public as well.

The existence and development of the union movement in El Salvador is a necessity for the advancement of democracy and political progress. The private sector and government workers must understand that a country cannot evolve with rampant exclusion, or with the disappearance of dissent; this system was already tried in the 60s and 70s, and lead to violence; insisting on continuing this system means not learning from the lessons of history. The planting of the seed of exclusion brings with it violence. This is not the path that we Salvadorians want. This is why the push towards reform is imminent.

